FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
Office of Administrative Law Judges
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February 1, 2018

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. STAKER & PARSON COMPANIES, Respondent	CIVIL PENALTY PROCEEDING Docket No. WEST 2017-134-M A.C. No. 42-00410-423470 Beck Street South

DECISION

Appearances: Timothy S. Williams, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado for Petitioner;
M. Craig Hall, Esq., and F. Xavier Balderas, Esq., Oldcastle Law Group, Atlanta, Georgia for Respondent.

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Staker & Parson Companies ("Staker") pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The parties presented testimony and documentary evidence at a hearing held in Salt Lake City, Utah, and filed post-hearing briefs. Two section 104(a) citations were adjudicated at the hearing. Staker operated the Beck Street South mine, a sand and gravel pit in Salt Lake County, Utah.

The two citations at issue stem from a fatal accident on March 8, 2016 in which a haul truck driver was killed when his truck traveled through a berm, down an embankment and into a partially flooded pit. For reasons set forth below, I **VACATE** Citation No. 8942613 and **MODIFY** Citation No. 8942614 to low negligence. Although I have not included a detailed summary of all evidence or each argument raised, I have fully considered all the evidence and arguments.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Beck Street South Mine is a single bench sand and gravel operation. Tr. 25. At the time of the fatal accident mine personnel were removing waste material from one area, loading the material into haul trucks, transporting the material to a dump site, and dumping the material into a pit. Tr. 25, 179. The designated dump site was at the top of an 80 foot embankment between two large piles of material. Tr. 28, 47; PX-15 p. 7. A berm was maintained along the

top edge of the embankment. Tr. 29. The purpose of the berm was to indicate the edge of the highwall and prevent a truck from backing close to the dropoff. Tr. 94, 122. The berm was 44 inches tall and 14 feet wide at its base. Tr. 29, 34-35. The dumping process involved the haul truck operator driving the truck into the dump site area with the berm at the top of the embankment on his left side, making a right turn such that the right-hand side pile of the two large piles of material could be seen in the haul truck's left side mirror, backing the truck into the area between the two large piles of material, and then dumping the truck's load between the two piles just short of the berm.[1] Tr. 27-31, 34-35, 181. The two piles of material (the "guide piles") directed the truck drivers to the correct dumping location but the berm also continued to the right well beyond the second guide pile. After dumping his load, the operator would lower his truck's bed and return for another load. Tr. 31-32.

On March 8, 2016, a fatal accident occurred when a haul truck driven by 54 year old Blaine Linck traveled through a berm, down the 80 foot tall embankment, and into 14 feet of water at the bottom of the pit. Tr. 20-21, 24-25. Linck drowned as a result of the accident.[2] Tr. 54. Jory Argyle[3], the mine's safety manager at the time of the accident, timely reported the accident to MSHA. Tr. 22.

MSHA Inspector Joe Summers[4] was assigned to lead the investigation of the fatality. Tr. 20-21, 24. As the lead investigator he coordinated with two other MSHA employees, Ron Medina[5], from MSHA's Technical Services, and Kent Norton, from MSHA's Educational, Field and Small Mine Services. Tr. 25

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[1] The haul truck operators dumped their loads away from the edge and berm. Tr. 32, 181. Staker had a policy that the trucks were not to hit or disturb the berms at any time. Tr. 194. Once the dumpsite between the two piles became full, a front loader would do a cleanup of the area by pushing the dumped loads over the embankment before ensuring that there was a new berm at the edge. Tr. 32-33.

[2] The autopsy confirmed drowning as the cause of death. Tr. 58-59.

[3] Argyle has been with Staker for twelve and a half years and has experience in the mining and road construction industries. Tr. 199. As the mine safety and health manager he was responsible for oversight of training over a broader area than just this mine and provided service to the mine on an as needed basis. Tr. 200, 212.

[4] Inspector Summers has been with MSHA for 12 years and conducted upwards of 400 metal/non-metal inspections. Tr. 17-18. He is a certified accident investigator and is trained to reconstruct the scene of an accident. Tr. 18, 119. However, he is not trained on how to analyze and draw conclusions based on disturbances of the earth to reconstruct accidents. Tr. 170. Prior to his time with MSHA, he worked at various mines operating equipment, including haul trucks similar in size and power to the one driven by Linck. Tr. 18-19.

[5] Medina is a member of MSHA's technical support department and specializes in equipment and components found on vehicles. He is not a MSHA inspector. Summers testified that MSHA ultimately determined that the truck did not contain any defects that contributed to the accident. Medina did not testify at hearing, but did provide deposition testimony during discovery. While

Inspector Summers traveled to the mine on March 9, the day after the accident, and met with a group of management officials from Staker. Tr. 40. Over the following weeks the investigation team took photographs and measurements, gathered documents, tested a similar truck, and interviewed employees of the mine. Tr. 41-43, 121.

During interviews, Inspector Summers learned that Linck began his shift at 4:00 PM and mine personnel noticed that the truck went missing at approximately 10:56 PM. Tr. 125. When the truck went missing, Neilo Taylor, the mine foreman, instructed mine personnel to cease operations and locate the truck. Tr. 56, 126. Clint Leek, the loader operator, went to the edge of the dump site, looked over, saw headlights from the truck in the pond below, and called in the accident over the radio. Tr. 56. Taylor, in response, went to the pit and swam to the truck where he found Linck deceased in the operator station face down in the water. Tr. 57, 108. The operable seatbelt for Linck was not secured. Tr. 108.

Inspector Summers testified that, during his time with MSHA, he has never heard of a situation where a seatbelt unlatches as a result of an accident. Tr. 109-110. Inspector Summers stated that Linck could have taken his seatbelt off at any time the evening of the accident and Staker would not have known. Tr. 110.

Inspector Summers testified that, based on records obtained and reviewed by Norton,[6] Staker's task training, training plan, and examinations relevant to the subject truck were all in order.[7] Tr. 54, 81. Further, the MSHA investigative team performed tests on the haul truck and determined that no defects were found with the braking system, backup camera, throttle, pressure in the steering system, or the safety system designed to prevent the truck from backing up while the bed was raised.[8] Tr. 79-81. In addition, the seatbelt in the truck, when tested multiple times,

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Medina offered deposition testimony with regard to other topics beyond the issue of whether the truck was a contributing factor, I decline to take that testimony into consideration given the court's inability to weigh his credibility.

[6] At hearing Respondent alleged that the Secretary had failed to produce Kent Norton for deposition and moved the court to infer that Norton's testimony would have been adverse to the Secretary. However, as the Secretary noted, Norton retired during this litigation and was no longer employed by MSHA. Although previous counsel for the Secretary indicated that he would attempt to produce Norton for deposition, current counsel for the Secretary informed counsel for the Respondent that he would not do so and Respondent made no attempt to obtain a subpoena for Norton's deposition testimony. Accordingly, I decline to apply the severe sanction of an adverse inference. Respondent's motion is **DENIED**.

[7] Summers testified that, while records indicate that proper pre and post-operational checks of the truck were done before Linck operated it, the pre-operational check documentation filled out by Linck was destroyed by water. Tr. 81.

[8] Testing of the actual steering was impossible due to damage to the front left of the truck. Tr. 80.

functioned as designed and was properly certified. Tr. 81-82, 110. MSHA determined that the condition of the truck was not a contributing factor to the accident.[9] Tr. 83, 156-158.

Based on his observations and other evidence collected, Inspector Summers determined that Linck drove beyond the two guide piles rather than backing up between the piles where he was required to dump the rock. The inspector believes that Linck's truck, while in reverse, overtraveled the 44 inch high berm to the right side of the pile marking the right edge of the dump site, tumbled down the 80 foot embankment,[10] landed right side up facing the opposite direction in 14 feet of water, causing Linck to drown. Tr. 28-29, 44-45, 58-59; PX-15 p. 1, 3, 5; PX-16 p. 2.[11] Inspector Summers agreed that, while it was dark out at the time of the accident, the lack of lighting in the area was not a contributing factor to the accident. Tr. 115-117. Inspector Summers observed tracks and rubber from the tires on the rocks in the area where the truck traveled through the berm. Tr. 59, 62; PX-15 p. 2. Based on this evidence, he theorized that Linck had pulled up to the berm, felt resistance, pressed the accelerator, which spun the tires and left rubber behind, powered through the berm, and traveled down the embankment into the pond 80 feet below.[12] Tr. 59-62, 152-153, 156. He explained that, while berms can retard the progress of a haul truck, they are designed to warn the driver and cannot stop a truck from going through them. Tr. 94, 122-124. Damage to the operator's station, front of the vehicle, rock guard above the cab, mirrors, walkways, handrails and access ladder on the truck indicated to Inspector Summers that the truck suffered a significant impact. Tr. 48-50, 142, 149; PX- 16 p. 4. The cab itself was beaten up, but intact. Tr. 110.

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[9] Although the truck was equipped with a proximity detector to provide information regarding materials behind the truck, it could not be tested because it had been submerged in water as a result of the accident. Tr. 147-148.

[10] Summers provided detailed testimony as to why he believed the truck traveled backward through the berm and how it traveled down the embankment. Tr. 64-79, 130-144; PX-15 p. 12-14. However, he conceded there was no way to know if the truck was going forwards or backwards when it went through the berm. Tr. 130, 171. Matt Wilson, a Staker witness, also believed that the truck was traveling in reverse when it went over the berm. Tr. 193-194. Although it is possible Summers correctly discerned the exact sequence of events as to how the truck tumbled down the embankment, I decline to credit that testimony given his lack of expertise on the topic. Nevertheless, I find that the photographs of the indentations in the embankment and the fact that the truck landed facing the opposite direction, establish that the truck was violently tossed around as it travelled down the embankment and likely rolled.

[11] Summers testified about and marked an aerial photo of the subject area. PX-12 p. 2. The photo was taken by Staker personnel using a drone. Tr. 36. At hearing, Summers used pink marker to show the road that the trucks travel into the dump site area, blue marker to show the designated dump site, green marker to show where Linck went through the berm outside of the designated dumpsite and down the embankment, and yellow marker to indicate where the truck ultimately came to rest at the bottom of the embankment in the pond. Tr. 35-39.

[12] On cross-examination Summers conceded that he was not capable of calculating the speed that the truck was traveling at the time, nor is he trained to conduct an analysis of what kind of force was required to damage the front of the truck and the attached ladders. Tr. 120-121.

While the cause of death was ultimately determined by the coroner to be drowning, Linck also suffered lacerations, abrasions and contusions to his body. Tr. 102-103; PX-13. Inspector Summers agreed that that these types of injuries are what one would expect a haul truck driver to suffer in an accident of this type. Tr. 102-103. The coroner's report indicated that pharmaceuticals, including antidepressants were found in Linck's system. Tr. 104, PX-13.

At the time of the accident Linck had been operating haul trucks at the mine for approximately four months. Tr. 55, 154, 175, 182. Inspector Summers confirmed that Linck's training, including his task training for operating the truck, was up to date and no deficiencies were noted. Tr. 55-56. Moreover, he agreed that Linck was properly trained by Staker to wear a seatbelt and taking the belt off at any time would have been contrary to his training. Tr. 111. Inspector Summers also learned that Linck had recently been diagnosed with type 2 diabetes and was going through a divorce. Tr. 160. However, these factors did not influence Summers' conclusions. Tr. 160.

During interviews, Inspector Summers learned that, approximately an hour prior to the fatal accident, Linck had been involved in an incident when the haul truck he was driving struck a berm on the haul road while on his way to the dump site. Tr. 85, 87-89, 100, 104-105. Although mine personnel asked Linck if he and the truck were okay, to which Linck responded "yes," nothing else was done. Tr. 86. 105. Matt Wilson,[13] the mine's foreman, who was not on site when the berm brush incident occurred, confirmed that mine personnel made contact with Linck after the incident and that Taylor felt that it was okay to allow Linck to continue working. Tr. 185.

Wilson testified that, with regard to the chain of command, Linck reported to Neilo Taylor who in turn reported to Wilson. Tr. 175. He averred that Linck was a model employee who had worked at the mine for four months, dumping in the same area, without any issues. Tr. 175, 183, 187-188. His driving skills were carefully monitored during his first month of driving to make sure he could safely perform the job. Argyle admitted that Linck was no longer permitted to drive a vehicle on public highways on behalf of Staker because his driver's license had been revoked the day prior to the accident.[14] Tr. 215-216. At some point after the fatal accident Wilson learned from Linck's family that Linck suffered from diabetes and was going through a nasty divorce. Tr. 192. Prior to that Staker had no knowledge of any health concerns with Linck. Tr. 191. Wilson explained that he was involved in the accident investigation and believed that the accident may have been an intentional act because Linck was a well-trained and competent truck operator, Linck's son told Wilson that he thought his father did it on purpose,

[13] Wilson started working at Staker in 1999. Tr. 173. He has worked as a laborer, road crew foreman, and was a quarry foreman at the time of the accident. Tr. 173-174.

[14] Argyle testified that Linck's loss of his license had no bearing on his ability to lawfully operate a haul truck on the mine property. Tr. 217. Had Staker been aware of the moving violations that resulted in the revocation of Linck's license, it would have taken it into account. Tr. 214. However, he explained that the operation of a haul truck is vastly different from a personal vehicle and haul truck operators are subject to driving tests, evaluations, and continuous monitoring by peers. Tr. 214-215.

and Linck was on medication with potential side effects such as blurred vision, mood and mental changes, and suicidal thoughts. Tr. 186-187, 192-193, 210; RX-25 and 26. Moreover, Wilson believed that it would have taken a serious and intentional effort on Linck's part to get through or over the berm. Staker built a berm of the same size on level ground to see how difficult it would be to travel over the berm.[15] Tr. 193-194. He agreed that the rubber and ruts on the ground near the berm indicate that the truck's accelerator had been pressed all the way down. Tr. 191.

Wilson explained that the mine conducts daily inspections and safety meetings. Tr. 183-184. Argyle testified that Staker maintains an employee driven safety culture, as evidenced by completed initial and refresher training, risk assessment tools utilized by the employees and weekly "toolbox talks" to discuss different safety processes and ensure that the employees are "constantly staying on top of any outcoming processes or procedures." Tr. 201-202.

Wilson explained that Staker's seatbelt policy requires operators to wear seatbelts,[16] equipment operators are trained on the policy, and employees are not allowed to operate equipment until they have shown they can do so correctly. Tr. 177. Argyle testified that, although the policy had been violated in the past, no citations had ever been issued and appropriate disciplinary action had been taken. Tr. 199, 211-212. According to Wilson, Linck always wore his seatbelt, was a safe driver, was properly trained on the equipment, as evidenced by the certificate of training,[17] and never had any disciplinary problems at the mine. Tr. 177-180; RX-20.

Citation No. 8942614

Citation No. 8942614, issued under section 104(a) of the Mine Act on April 26, 2016, alleges a violation of Section 56.9101 of the Secretary's safety standards and asserts that the haul truck driver failed to maintain control of the haul truck when the vehicle traveled through a berm and off a dump site into a partially flooded pit. The citation further alleges that there were no signs of evasive or corrective actions taken by the driver to maintain control of the truck. Section 56.9101 requires that "[o]perators of self-propelled mobile equipment shall maintain

[15] Wilson testified that Staker conducted two tests in which an operator drove an identical truck into a simulated berm. Tr. 188. The berm was constructed to the same measurements as the berm Linck's truck went through. Tr.189. During the first test, for which MSHA personnel were present, the truck stopped when it ran into the berm at the required low speed. Tr. 189-190, 195. Summers confirmed that the test revealed a berm would be minimally disturbed if it were struck by a truck. Tr. 59. During the second test, when MSHA was not present, the truck was unable to breach the berm in reverse even while traveling at a higher speed. Tr. 190.

[16] The haul trucks are equipped with orange seatbelt straps so it is easy to see from outside of the cab whether an operator is wearing it. Tr. 177-178, 203.

[17] Wilson said that 40 hours of training was provided, after which equipment operators must sit down with Wilson and go over safety procedures until Wilson feels that they are safe to run the equipment, at which point the operator signs the certificate of training and keeps a copy in their wallet. Tr. 180

control of the equipment while it is in motion. Operating speeds shall be consistent with conditions of roadways, tracks, grades, clearance, visibility, and traffic, and the type of equipment used." 30 C.F.R. § 56.9101.

Inspector Summers determined that a fatal injury had occurred, the condition was S&S, affected one person, and was the result of Respondent's moderate negligence. The Secretary proposed a penalty of $3,876.00 for this alleged violation,

Inspector Summers testified that he determined the standard had been violated because Linck deviated from normal procedures, he was not aware of the surroundings and he backed up into an area outside of the designated dump site and powered through the berm. Tr. 90. As a result, he did not have full control of the truck. Tr. 89-90. He explained that, in order to be in control of the truck the operator must be trained and know the operating conditions (i.e., the load, the surroundings, what equipment and personnel are in the area, and where and how you are going to dump). Tr. 91-92. Because Linck did not have control while the truck powered through the berm, which required a significant amount of force, Inspector Summers determined there was a violation of the standard. Tr. 92-94. Moreover, he explained that because it required a significant amount of force to get through the berm, he did not believe the operating speed that Linck's truck was traveling was consistent with the condition of the roadway and grade. Tr. 94-95.

Inspector Summers testified that it does not matter why Linck failed to maintain control and stated that even if Linck had been mistaken about his location, was suffering from a medical condition that caused him to lose control, was on medications that affected his knowledge of the surroundings, or accidentally stepped on the accelerator instead of the brake, he nevertheless failed to maintain control, thereby violating the standard. Tr. 98-100, 155-156. Moreover, he noted that while he could not be sure if Linck intentionally tried to power over the berm, intent is not a factor to consider when determining whether there was a violation. Tr. 153-154, 61.

I find that the Secretary has proven a violation of the cited standard. The cited standard requires that equipment operators maintain control of the equipment. Respondent argues that in order "[f]or the Secretary to meet its evidentiary burden it must prove by a preponderance of the evidence that Linck's failure to maintain control of the Vehicle was the only plausible cause of the Accident." Staker Br. 16. I disagree. I must determine whether Staker violated the safety standard not whether the violation caused the accident. Given the strict liability nature of the Mine Act, whether Linck purposefully powered through the berm or accidently did so is not dispositive. The Commission, in *Daanen v. Janssen, Inc.*, 20 FMSHRC 189, 196 (Mar. 1998) confirmed that the "reasons for a loss of control are irrelevant to consideration of whether control over moving equipment was maintained." Rather, in order to sustain a violation the Secretary need only prove that Linck lost control of the truck at some point. Even if I were to assume that Linck intentionally drove through the berm, thereby "controlling" the vehicle as it powered through the material, there can be no question that he was not in control of the vehicle as it tumbled down the embankment. Moreover, it is clear that, in powering through the berm outside of the designated dumping area Linck was not following the mine's proscribed dumping and truck handling procedures, which call for the truck operator to dump between the two large guide

piles and not make contact with a berm. Accordingly, I find that Linck did not maintain control of the truck.

Notwithstanding the above analysis, I would also find a violation under the second part of the cited standard, which requires that the truck be operated at a speed consistent with conditions of the area. In order for the truck to have powered through the berm it had to have been traveling at a very high rate of speed. Wilson agreed that the rubber and ruts on the ground near the berm that the truck went through were evidence that the truck's accelerator had been pressed all the way down. Tr. 191. Moreover, the low speed testing conducted by Staker with MSHA present as well as the subsequent higher speed testing make clear that the truck must have been traveling at an exceptionally high rate of speed in order to break through or travel over the berm. Because the truck was clearly operating at a speed in excess of that which was appropriate, I find that a violation has also been proven under the second part of the standard.

Gravity and S&S

A S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d). In order to establish the S&S nature of a violation, the Secretary must prove "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard - that is, a measure of danger to safety - contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An experienced MSHA inspector's opinion that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998).

The Commission has explained that the focus of the *Mathies* analysis "centers on the interplay between the second and third steps." *ICG Illinois*, 38 FMSHRC 2473, 2475 (Oct. 2016) (citing *Newtown Energy Inc.*, 38 FMSHRC 2033 (Aug. 2016)). The second step requires the judge to adequately define the "particular hazard to which the violation allegedly contributes[,]" and then determine whether "there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed." *Id.* at 2475-2476. This determination must be made "based on the particular facts surrounding the violation[.]" *Id.* The third step then requires the judge to assume the existence of a hazard and assess whether the hazard "was reasonably likely to result in serious injury." *Newtown* at 2038; *ICG Illinois* at 2476.

The "reasonably likely" provision does not require the Secretary to prove that an injury was "more probable than not." *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). In addition, the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury" but, rather, that the hazard *contributed to* by the violation is reasonably likely to cause an injury. *Musser Engineering, Inc. and PBS Coals Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) (emphasis added); *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011).

Inspector Summers designated the citation as S&S because the failure to maintain control of the truck could cause a crash that would result in serious and potentially fatal injuries such as, bruising, contusions, broken bones, and internal injuries to both the driver and others in the area. Tr. 100-101. He noted that the medical examiner's report, while indicating drowning as the cause of death, also referenced lacerations, abrasions and contusions on Linck's body. Tr. 102-103. Inspector Summers characterized the injuries as blunt force type injuries that would be expected on a haul truck driver when they have an accident. Tr. 104.

I find that the violation was S&S. I have already found that a violation existed. Here, the hazard to which the violation allegedly contributes is a crash or other accident that results from failure to maintain control of the truck. Assuming that control of the truck is lost, as it was here, a multi-ton vehicle tumbling out of control down an 80 foot embankment into a 14 foot deep pond is reasonably likely to result in very serious injuries. Consequently, I find that the violation was S&S and the gravity was high.

Negligence

Inspector Summers designated the citation as being the result of Staker's moderate negligence. Tr. 106. He noted that while Linck was properly trained and knew how to operate the truck, Staker management did not take action to ascertain whether Linck was physically and mentally capable of operating the truck, or on any medication that might impair his driving, after he brushed against the berm earlier in the shift. Tr. 105-106, 161. On cross-examination Summers agreed that Staker did everything right with regard to training, equipment maintenance, and testing. Tr. 127-129. Moreover, Inspector Summers agreed that Staker prohibited trucks from coming into contact with a berm. Tr. 154-155.

Negligence is not defined in the Mine Act. The Commission determines negligence under a traditional analysis rather than relying on the Secretary's regulations at 30 C.F.R. § 100.3(d). *Mach Mining, LLC v. Sec'y of Labor,* 809 F.3d 1259, 1264 (D.C. Cir. 2016) (quoting *Brody Mining,* 37 FMSHRC 1687, 1702 (Aug. 2015)). Each mandatory standard carries a requisite duty of care. *Id.* In making a negligence determination, the Commission takes into account the relevant facts, the protective purpose of the regulation, and what actions would be taken by a reasonably prudent person familiar with the mining industry. *Id.* In evaluating these factors, the negligence determination is based on the "totality of the circumstances holistically" and may include other mitigating circumstances unique to the violation. *Id.* (quoting *Brody Mining,* 37 FMSHRC at 1703).

I find that Respondent exhibited only very low negligence. Inspector Summers agreed that Linck was properly trained, the condition of the truck was not a contributing factor, and Staker's training and safety policies were good. However, I find that Staker management's failure to conduct even a cursory investigation of the berm brushing incident prior to the fatal accident nevertheless warrants a finding of at least some negligence. Rather than conduct a brief investigation, Staker personnel instead only asked Linck if he and the truck were okay. Although the berm brush event was rather inconsequential, at the very least it put Staker on notice that Linck had failed to comply with one of Staker's own internal safety policies to never come in contact with a berm and also on notice that Linck might not have been in condition to

drive that night. Citation No. 8942614 is **MODIFIED** to low negligence. I find that a penalty of $1,000 is appropriate.

Citation No. 8942613

Citation No. 8942613, issued under section 104(a) of the Mine Act on April 26, 2016, alleges a violation of Section 56.14131(a) of the Secretary's safety standards and asserts that the haul truck driver was not wearing a seatbelt at the time of the accident. Section 56.14131(a) requires that "[s]eat belts shall be provided and worn in haulage trucks." 30 C.F.R. § 56.14131(a).

Inspector Summers determined that a fatal injury had occurred, the condition affected one person and was S&S, and was the result of Respondent's moderate negligence. The Secretary proposed a penalty of $3,876.00 for this alleged violation.

Inspector Summers testified that the standard was violated because Linck was found without his seatbelt on, floating face down in the water. Tr. 108. He explained that the standard requires that belts be worn at all times when in haulage trucks. Tr. 110. On cross-examination he agreed that it would have gone against Linck's training for him to have not worn his seatbelt. Tr. 164.

In order for the Secretary to establish a violation of the cited standard he must prove by a preponderance of the evidence that Linck was not wearing his seatbelt while operating the haul truck. Respondent asserts, and I agree, that the Secretary has failed to establish that the Linck was not wearing his seatbelt while operating the haul truck. While there is no dispute that when Staker personnel found Linck's body he was not wearing a seatbelt, there were no witnesses to the accident, and the evidence before me is far from conclusive as to when Linck detached his seatbelt. The Secretary asks the court to infer, based on indirect evidence, that Linck was not wearing his seatbelt while operating the truck. I decline to do so for two reasons.

First, I credit Wilson and Argyle's testimony that Linck was well trained in the use of his seatbelt, Staker enforced its seatbelt policy, and Linck had never been seen operating a vehicle without wearing a seatbelt. Moreover, Inspector Summers agreed that Linck was properly trained by Staker to wear a seatbelt and taking the belt off at any time would have been contrary to his training.

Second, the physical evidence suggests that Linck may have in fact been wearing his seatbelt while the truck fell down the embankment. Inspector Summers testified that, although Linck was found face down with his head in the water towards the passenger side, he was nevertheless still in the operator station of the truck. Had Linck not been wearing his seatbelt, I find it less than likely that he would have been in the position in which he was found, especially given that windows of the operator station had broken out, and the truck had clearly been violently tossed about and likely rolled, as it tumbled down the embankment. Moreover, I agree with Respondent that the medical conclusions documented in the autopsy report do not seem to support the Secretary's theory that Linck was unbuckled during the accident sequence. Staker Br. 13-14. The report documents lacerations to the head and superficial blunt force injuries to the

torso and extremities. Notably, no broken bones or internal injuries were found.[18] Had Linck been unbuckled during such a violent tumble down the embankment, it is likely he would have sustained greater injuries. Given the above analysis, I find that it is just as likely that Linck unlatched the seatbelt when the truck came to rest at the bottom of the pit or just prior to that time. Consequently, I find that the Secretary has failed to meet his burden of proof. Citation No. 8942613 is **VACATED**.

II. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. 30 U.S.C. § 820(i). According to MSHA's website Staker worked approximately 40,000 hours during 2015 and during 2016, which correlates with a small to medium size operator. 30 C.F.R. § 100.3 Table III; Exhibit A to Penalty Petition. Exhibit A to the penalty petition indicates that Staker's controller worked over 7,000,000 hours, which correlates with a large controller. 30 C.F.R. § 100.3 Table IV. Respondent has not argued that the penalty will affect its ability to remain in business. Respondent's violation history indicates four 104(a) citations, only one of which was designated as S&S, in the 15 months preceding the issuance of Citation No. 8942614. The gravity and negligence are discussed above. Citation No. 8942614 was timely abated. Based on the penalty criteria I assess a total penalty of $1,000.

III. ORDER

For reasons set forth above, Citation No. 8942613 is **VACATED** and Citation No. 8942614 is **MODIFIED** to low negligence. Staker & Parson Companies is **ORDERED TO PAY** the Secretary of Labor the sum of $1,000 within 40 days of the date of this decision.[19]

Richard W. Manning
Administrative Law Judge

[18] Summers testified that broken bones and internal injuries would be expected in an accident like this. The autopsy report concludes that these types of injuries were not present. This evidence supports a conclusion that Linck was likely wearing his seatbelt as his truck tumbled down the.

[19] Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

Distribution:

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